Government of the District of Columbia
Anthony A. Williams, Mayor

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Chief Health Officer
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Director, Department of Health

INFORMATION FOR THE MEDICAL COMMUNITY AND THE PUBLIC FROM THE

D.C. BOARD OF MEDICINE

July 1999

WHAT SHOULD YOU DO WHEN YOU GET A SUBPOENA?

In response to this frequent question, the D.C. Board of Medicine solicited an opinion from the Office of the D.C. Corporation Counsel. The Office of the Corporation Counsel advised as follows:

In the federal courts in the District of Columbia and District of Columbia courts a physician or surgeon or mental health professional as defined by the District of Columbia Mental Health Information Act of 1978 (D.C. Code § 6-2001 *et seq.*) may not be permitted, without consent of the person afflicted, or his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that it was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

Thus, physicians generally may not disclose confidential information without patient consent if it is to be used in any federal or local court in the District. However, D.C. Code § 14-307(b) lists four exceptions where the privilege does not apply. These include communications that can be considered: (1) evidence in criminal cases where the accused is charged with causing the death of, or inflicting serious injuries upon, a human being and the disclosure is required in the interests of public justice; (2) evidence related to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity; (3) evidence relating to the mental competency or sanity of a child alleged to be delinquent, neglected, or in need of supervision in any proceeding before the Family Division of the Superior Court of the District of Columbia; and (4) evidence in criminal or civil cases where a person is alleged to have defrauded the District of Columbia or federal government in relation to receiving or providing services under the District of Columbia medical assistance program. If one of these four exceptions is met, a judge can determine that relevant medical evidence located in the patient's records is obtainable by subpoena, without the patient's consent. See *Brown v. United States*, 567 A.2d 426 (1989).

A patient may also voluntarily or involuntarily waive this physician-patient privilege, A voluntary waiver would occur when the patient agrees to have his medical records released. Determining "[w]hether an involuntary or implied waiver has occurred depends upon the facts or circumstances of the particular case." *Nelson v. United States*, 649 A.2d 301, 308 (D.C. 1994). However, there are several instances where D.C. Courts have found an implied waiver of the privilege to have occurred. If a patient places his or her physical condition at issue in filing a lawsuit, the "plaintiff has waived [his or] her statutory privilege against disclosure of relevant medical evidence." *Skaglen v. Greater Southeast Community Hospital*, 625 F. Supp. 991 (D.C. 1984). In addition a plaintiff will waive this medical privilege with regard to all similar medical records when he or she provides a "defendant with portions of [his or] her medical records pertaining to treatment" related to the alleged injury. *Id.* Furthermore, " [a]n authorization for release of medical information contained in a contract of insurance has been equated with the waiver of the physician-patient privilege where pertinent to a suit for recovery under the policy." *Nelson*, at 308 (citing *Jones v. Prudential Ins. Co.*, 388 A.2d 476, 483 (D.C. 1978)). Also under D.C. Code § 33-566, information communicated to a physician in an effort unlawfully to procure controlled substances is not considered privileged communication.

In addition to this statutory evidentiary privilege, the D.C. Court of Appeals has recognized a cause of action in tort for "a breach of the confidential physician-patient relationship, based on statutory privilege [§14-307] and on certain licensing statutes which generally prohibit physicians from disclosing patient treatment, except in cases of gunshot wounds and child neglect." *Street v. Hedgepath et al*., 607 A.2d 1238, 1245 (D.C. 1992) (citing *Vassilades v. Garfinckel's, Brooks Brothers, Miller & Rhoades, Inc.*, 492 A.2d 580, 591 (D.C. 1985)). This tort is based on the "unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship." *Id.* It should be noted, however, that no cause of action in tort for a breach of the confidential physician-patient relationship exists when the physician-patient relationship has been waived as "lack of consent to the disclosure is an essential element of the tort." *Street v. Hedgepeth*, 607 A.2d 1238, 1247 (D.C. 1992).

Procedure to Follow When a Subpoena is Received

Generally, information about the patient should not be released by the physician pursuant to a subpoena unless the patient has authorized the physician to release the information in writing, the Court has waived the physician-patient privilege and authorized the release of the information, or the physician is satisfied that the patient has waived the privilege by filing a lawsuit. We strongly suggest that the physician consult with an attorney before releasing any information pursuant to a subpoena.

However, to make you familiar with the procedure, I can tell you that a subpoena may be issued in both civil and criminal cases. Each possesses a different set of procedures. Subpoenas issued for civil cases in the Superior Court are governed

by Superior Court Civil Procedure Rule 45 ("Rule 45"). Rule 45(a)(1)(c) allows a subpoena to be issued to produce or permit inspection and copying, of designated documents, including medical records, at a specified time and place. Usually, the subpoena will be issued as a result of the patient's refusal to release his or her medical records. Thus, physicians need to be aware of whether their patient is invoking the patient-physician privilege. Once a District government-licensed physician receives the subpoena to produce medical records, he or she may file a written objection within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service upon the party or the attorney designated in the subpoena. Rule 45(c)(2)(b). If the District physician files a written objection, the party serving the subpoena shall not be entitled to inspect or copy the patient's records except pursuant to an order of the Court. *Id.* After an objection by the District physician has been made, the party serving the subpoena may move at any time for a motion to compel production, leaving the decision to the Court. *Id.* It should be noted that in making its decision the Court is required to quash or modify the subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Rule 45 (c)(3)(a). If the Court determines to grant the motion to compel production of the medical records, the physician should comply with the directions of the Court order.

Subpoenas issued for the production of documentary evidence, including medical records, in criminal cases in Superior Court are governed by Superior Court Criminal Procedure Rule 17(c) ("Rule 17(c)"). Like Rule 45, Rule 17(c) is virtually identical to its federal counterpart. See *Brown v. United States*, 567 A.2d 426, 427 (1989). As noted by the exceptions listed in D.C. Code § 14-307(b), it is more difficult to keep medical records from being disclosed in criminal cases than in civil cases. After receiving a subpoena for the production of medical records, an objection by a physician must be filed promptly and show that compliance with the subpoena would be unreasonable or oppressive. *Id*. Otherwise, the District physician is required to comply with the subpoena. The case of *Brown v. United States*, 567 A.2d 426 (1989), makes it clear that any subpoena issued for medical records issued under Rule 17(c) based on the exceptions listed at D.C. Code § 14-307(b)(1)—evidence in criminal cases where the accused has murdered or caused physical injury to another human being—must be delivered to the Court rather than being delivered to the custodian of records. This is so because any decision to allow the disclosure of medical records must be made by the Court in the first instance. *Brown* at 428. The D.C. Court of Appeals stated, "[w]hen D.C. Code § 14-307 applies and the exception relied upon is that contained in § 307(b), prior leave of court is required before any subpoena may be served by anyone for the production of material covered by that statute **for use in preparing for, or otherwise in connection with a trial."** *Id*. (emphasis added).

New Board Members

On June 30, 1999 Dr. Robert T. Greenfield, Jr., M.D. was sworn for another term as Chairperson of the D.C.

Board of Medicine. Working with Dr. Greenfield will be a new physician member and two new consumer members.

The new physician member is Morton J. Roberts, M.D. Dr. Roberts is a graduate of George Washington University Medical School and has been licensed to practice medicine in the District of Columbia since 1969. Dr. Roberts replaces William E. Brown, M.D., member and former Chair-person of the Board, whose term expired.

The new consumer members are Mattie Curry Cheek, Ph.D. and Mrs. Savanna M. Clark. Dr. Cheek has a doctorate in special education administration from the University of Maryland and has been very active in educational and civic programs. Mrs. Clark has been similarly active in educational and civic programs and has earned a masters degree in education from the University of Oklahoma. One of these consumer members replaces Mr. Quintin Wilkinson, whose term expired; and the other fills a vacancy on the Board.

The Board and staff issue their collective welcome to the new members and its sincere thanks to Dr. Brown and Mr. Wilkinson for their dedicated service to the D.C. Board of Medicine and the citizens of the District of Columbia.

"Professional License Fee" Eliminated

The "Professional License Fee," the annual $250 assessment that was administered by the Department of Finance and Revenue, was eliminated on April 20, 1999. The D.C. Board of Medicine has lobbied for elimination of this fee, almost since it was imposed in 1992. The title of the assessment was a source of confusion to the licensees on whom it was assessed, and the D.C. Board of Medicine has repeatedly lobbied for its repeal. In addition to the confusing title, the revenue from this assessment, which was several times the medical licensing fee revenue, was not used for professional regulation. Many professions, including medicine, experienced noticeable reductions in licensee populations after the "professional license fee" was imposed.

New Offices

In case you didn't hear, we moved! The office of the D.C. Board of Medicine—and all other health licensing boards—moved on April 1, 1999 to new Department of Health offices at 825 North Capitol Street, N.E., Room 2224, Washington, D.C. 20002. The phone number is (202) 442-9200. The fax number is (202) 442-9431.

Medical applications are still being processed by a contractor, Assessment Systems, Inc. (ASI). Interested parties may secure an application by calling ASI at 1-888-204-6193.

If you need a verification of licensure (letter of good standing) for a health facility or another jurisdiction, or you have a complaint or other question about the regulation of medicine, you should contact the Board of Medicine office. Board meetings are held on the last Wednesday of each month beginning at 9:00 am in Room 2204, 825 North Capitol Street, N.E., Washington, D.C. 20002.

Is Your Address Current With the Board?

District of Columbia regulations require all licensed health professionals to notify the Department of Health within thirty days of changing a home or business address. Failure to do so may subject a licensee to disciplinary action. Call 1-888-204-6193.

NEWSLETTERS ON INTERNET

This newsletter and the other newsletters published this year are available to the interested on the internet. The address is www.dchealth.com. Once you get to that site, you click on "Administrations and Offices;" then "Health Regulation Administration;" then "Newsletters."

THE D.C. BOARD OF MEDICINE

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Board offices are located at 825 N. Capitol St., N.E., Room 2224, Washington, D.C. 20002. The phone number is (202) 442-9200. The fax number is (202) 442-9431. The staff is supervised by James R. Granger, Jr., Executive Director.

BOARD ORDERS Jan.-Jun. 1999

Steven C. Barber, M.D. 1/27/99: Summary suspension of 11/27/98 lifted by consent order with practice restrictions and reporting requirements.

Carl E. Bell, M.D. 6/30/99: License denied. License in other jurisdictions not in good standing as required by D.C. law.

Gideon M. Kioko, M.D. 6/30/99: Probation terminated. Physician's license in then District of Columbia is restored to unencumbered status following restoration in Maryland.

Kyung S. Park, M.D. 6/30/99: Reprimanded. Physician was disciplined in Virginia for actions that would be grounds for disciplinary action in the District of Columbia (sexual relationship with a patient and inappropriate prescribing for that patient).

Jewel A. Quinn, Jr., M.D. 6/30/99: Fined $1,000.00 for maintaining an unsanitary office at 306 H Street, N.E.; Washington, D.C. 20002.

Do YOU have a practice issue that you would like addressed in a future newsletter?
If so, please state your issue in writing to:

Mr. James R. Granger, Jr.
Executive Director
D.C. Board of Medicine
825 N. Capitol Street, N.E., Room 2224
Washington, D.C. 20002